(3)

No. 02-203

Supreme Court, U.S.
FILED
SEP 26 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ALEXANDER P. SOMMER,
and his counsel, JOHN G. WARNER,

Petitioners,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

JOHN G. WARNER
LAW OFFICE OF JOHN G. WARNER
21 Tamal Vista Blvd., Suite 196
Corte Madera, CA 94925
(415) 924-2640
California State Bar No. 046123
Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pgs

TABLE OF CONTENTS

	Page
INTRODUCTION	1
RESPONDENT'S ARGUMENTS	2
THE DOCTRINE OF RES JUDICATA	3
FIRST CASE NOT DECIDED ON THE MERITS	4
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 91 S.Ct. 1434 (1971) 3

Carrington Estate Planning Services, et al. v. Reliance Standard Life Ins. Co., 289 F.3d 644 (9th Cir. 2002) 6

Comunale v. Traders & General Ins. Co., 116 Cal.App.2d 198, 253 P.2d 495 (1953) 6

Diaz v. United Agricultural Employee Welfare Benefit Plan & Trust, 50 F.3d 1478 (9th Cir. 1995) 7

Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co., 189 Cal.App.3d 1072, 234 Cal.Rptr. 835 (1987) 6

Nordhorn v. Ladish Co., Inc., 9 F.3d 1402 (9th Cir. 1993) 3

Northwestern Title Sec. Co. v. Flack, 6 Cal.App.3d 134, 85 Cal.Rptr. 693 (1970) 6

Sarraf v. Standard Insurance Co., 102 F.3d 991 (9th Cir. 1996) 7

Select Ins. Co. v. Superior Court (Custer), 226 Cal.App.3d 631, 276 Cal.Rptr. 598 (1990) 6

UNUM Life Insurance Company of America v. Ward, 526 U.S. 358, 119 S.Ct. 1380 (1999) 6

White v. Jacobs Engineering Group, 896 F.2d 344 (9th Cir. 1989) 5, 6

INTRODUCTION

The Petitioner, Alexander P. Sommer, is a 65 year old former securities dealer who was forced to retire six years ago due to severe organic brain deficits resulting from three separate brain surgeries in 1988-1989. (App. 10.) At the time he quit working, in 1996, Petitioner was covered under a long-term disability insurance policy issued by Respondent, UNUM. (App. 10.) These are undisputed facts.

When Petitioner sued UNUM to enforce his disability benefits, the district court in the first case entered judgment in favor of UNUM because the district court found that Petitioner had failed to exhaust his administrative remedies. (App. 21.) This point is also undisputed.

Petitioner has brought this second lawsuit against UNUM, this time contending that he has exhausted his administrative remedies.[1]

Thus, the issue before the Court in this petition concerns an important question of nationwide significance:

- May an ERISA benefits claimant file a second lawsuit, when the first lawsuit results in a judgment that the claimant failed to exhaust his or her administrative remedies?

  Petitioner says yes.

---

[1] To clarify the record, Petitioner's *second* lawsuit is referred to as *Sommer III* in Respondent's opposition brief.

- Is the failure to exhaust administrative remedies a decision on the merits which would trigger the defense of res judicata?

  Petitioner says no.

- What statute or regulation or case law states that in an ERISA case the failure to exhaust administrative remedies is a decision on the merits?

  Petitioner says none.

- If the Court of Appeals decision below is allowed to stand, will this result in an unjust forfeiture of Petitioner's disability benefits?

  Petitioner says yes.

RESPONDENT'S ARGUMENTS

In its opposition to this petition, UNUM has presented two arguments, namely, (1) that Petitioner's second lawsuit is barred by the doctrine of res judicata because the first lawsuit, the one decided by Judge Jensen in 1997, was a final judgment on the merits; and (2) in an ERISA case a final judgment by the district court that a claimant has failed to exhaust his or her administrative remedies should be treated as a judgment on the merits.

Petitioner will discuss each of these arguments *ad seriatim*.

THE DOCTRINE OF RES JUDICATA

Both the district court and the court of appeals below concluded that this second lawsuit for ERISA benefits was barred by the doctrine of res judicata. (App. 4-5.) However, that conclusion is without merit because one of the elements of the doctrine of res judicata is that the prior case resulted in a final judgment on the merits.

The leading case on this issue is *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-324, 91 S.Ct. 1434, 1440-1441 (1971). In *Blonder-Tongue*, the Supreme Court, applying California law, concluded that the doctrine of res judicata requires proof of three elements, namely that the prior case involved the same claim; that the prior case involved the same parties or persons in privity of interest with them; and that the prior case resulted in a final judgment *on the merits*. This holding in *Blonder-Tongue* has been subsequently followed by all federal courts. See, for example, *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9th Cir. 1993).

In the present case the res judicata element in dispute is the one which requires that the prior case result in a final judgment *on the merits*. Petitioner submits that based upon both decisional law and the opinions of the leading commentators on federal civil procedure, as cited in Petitioner's opening brief, it has been held without any exception that a judgment for failure to exhaust administrative remedies is not a final judgment on the merits, and UNUM has not cited a single case or other authority to the contrary.

In conclusion, then, if the prior case, as here, resulted in a judgment in favor of UNUM due to Petitioner's failure to exhaust administrative remedies, such a judgment was

not a final judgment on the merits, therefore the doctrine of res judicata does not apply.

FIRST CASE NOT DECIDED ON THE MERITS

It is undisputed here that *the only reason* the district court dismissed Petitioner's first lawsuit under UNUM's Wedbush disability policy, which is the only disability policy at issue in this petition, was because Petitioner had failed to exhaust his administrative remedies. Proof of this point is found in the district court's decision dated April 9, 2001. (App. 9-24.) In that decision the district court quoted verbatim its entire analysis of Petitioner's claim under the Wedbush disability policy. (App. 21.) In doing so, the district court made the following statement:

> Because plaintiff now makes no argument as to why an administrative appeal would have been futile, the Court holds that his present claim is barred for failure to exhaust his administrative remedies.

(App. 21.)

The district court gave no other reasons for denying Petitioner's first lawsuit. On this point Petitioner and UNUM are in complete agreement. Thus, if, as argued by Petitioner in his opening brief, a judgment in an ERISA case due to failure to exhaust administrative remedies is not a final judgment on the merits, the doctrine of res judicata does not apply and therefore Petitioner's second lawsuit was improperly dismissed.

UNUM attempts to avoid this obvious conclusion by contending that, unlike other administrative or contractual claims, a judgment in an ERISA case for failure to exhaust administrative remedies should be treated as a judgment on the merits.

In making this contention, UNUM has presented two arguments, neither of which has any merit. First, UNUM argues that in its denial letter it stated that Petitioner had only sixty (60) days in which to ask for further administrative review and that since that sixty (60) day period of time has now passed, UNUM states that Petitioner is unable to exhaust his administrative remedies under the disability policy. (R's App. 6-7.) However, it should be noted that the sixty (60) day time limit set forth in UNUM's letter, and relied upon by the district court below, is not a contractual term but simply is a time limit unilaterally imposed by UNUM in its denial form letters. There are no provisions in the ERISA statute or in UNUM's insurance contract which in any way sets forth or enforces this sixty (60) day rule.

UNUM cites the Ninth Circuit case of *White v. Jacobs Engineering Group*, 896 F.2d 344, 349 (9th Cir. 1989) as support for its enforcement of this sixty (60) day time limit. However, the *White* case merely stands for the proposition that failure to exhaust administrative remedies can be asserted as a defense to an ERISA claim. The court in *White* did not discuss what would happen in the event that the claimant's first case was dismissed for failure to exhaust administrative remedies and the claimant then brought a second case after exhausting those remedies.

It should be further noted that whatever holding in the *White* case that has any relevance here was overturned by the Supreme Court in a subsequent case entitled *UNUM Life Insurance Company of America v. Ward*, 526 U.S. 358, 119 S.Ct. 1380 (1999) in which the Court concluded that ERISA did not preempt California's notice-prejudice rule. Under California insurance law, unless an insurer can demonstrate actual prejudice from a late notice, the insured's failure to provide timely notice will not defeat coverage. (*Northwestern Title Sec. Co. v. Flack*, 6 Cal.App.3d 134, 141-143, 85 Cal.Rptr. 693, 696-698 (1970); *Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co.*, 189 Cal.App.3d 1072, 1088-1089, 234 Cal.Rptr. 835, 843-844 (1987); *Select Ins. Co. v. Superior Court (Custer)*, 226 Cal.App.3d 631, 276 Cal.Rptr. 598 (1990).) Moreover, under California insurance law if the insurer such as UNUM denies coverage, it waives any claim that the insured failed to comply with the notice provisions of the policy. (*Comunale v. Traders & General Ins. Co.*, 116 Cal.App.2d 198, 202-203, 253 P.2d 495, 499 (1953).)

It should also be noted in this context that in the absence of prejudice, policy conditions which require the giving of "notice of loss" or the filing of "proof of loss" within a specified period of time should not be applied to work a forfeiture of the insurance claim. (*Carrington Estate Planning Services, et al. v. Reliance Standard Life Ins. Co.*, 289 F.3d 644, 646-647 (9th Cir. 2002), applying the notice-prejudice rule under Arizona law and Rhode Island law similar to California law.)

The second argument made by UNUM in an attempt to persuade this Court that a judgment due to failure to exhaust administrative remedies is a judgment on the merits is its contention that the district court below in the

first case entered a "summary judgment" and not a "dismissal judgment" and in doing so relied upon the cases of *Diaz v. United Agricultural Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1480 (9th Cir. 1995) and *Sarraf v. Standard Insurance Co.*, 102 F.3d 991, 992 (9th Cir. 1996). However, these two cases simply stand for the proposition that the failure to exhaust administrative remedies is a valid defense under ERISA. Neither case discusses what happens in a second case brought by a claimant after exhausting those administrative remedies.

Equally important, it should be noted that the difference between a "summary judgment" and a "dismissal judgment" should not turn on the choice of words used by the trial court but on the reasoning used by the court. Here, it is undisputed that the district court in the first case dismissed Petitioner's claim under UNUM's Wedbush policy due to failure to exhaust administrative remedies. As Petitioner correctly pointed out in his opening brief in support of this writ petition, such a judgment should not be treated as a judgment on the merits, therefore the doctrine of res judicata does not apply.

CONCLUSION

As suggested by Petitioner in his opening brief, the defense of failure to exhaust administrative remedies arises frequently in ERISA cases. When an ERISA case is dismissed for that reason, there is no provision in the ERISA statute or in the legislative history of this statute which would indicate that Congress intended a forfeiture of the claimant's benefits. To prevent such a forfeiture, this

Court should grant this petition and give this issue a full hearing.

Respectfully submitted,

JOHN G. WARNER
LAW OFFICE OF JOHN G. WARNER
21 Tamal Vista Blvd., Suite 196
Corte Madera, CA 94925
(415) 924-2640
California State Bar No. 046123